FEB 17 1994

No. 93-1035

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RONALD L. HARTMAN, KATHERINA H. HARTMAN, and as Next Friend to JEFFERY ALAN HARTMAN and ANGELA MARIE HARTMAN, Both minors individually; and LAURA JENKINS, Individually and as Representative of Eddie Jenkins, Deceased; PEGGY SANDS, Individually and as Representative of the Estate of Martin Sands; EMILE ANNIBOLLI; EARL THOMPSON and JUDY L. THOMPSON
Petitioners

v.

DIAMOND SHAMROCK CHEMICALS COMPANY; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T H AGRICULTURE & NUTRITION COMPANY, INC.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY OF HARTMAN PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY OF HARTMAN PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION

The Hartman Petitioners hereby respond to the Respondents' Brief in Opposition as follows:

I.

Respondents' Brief Overlooks Central Fact That all Petitioners Were Absentee Plaintiffs In the Class Action Which Settled in 1984 ("1984 Class Action")

The Respondents' brief overlooks the central, undisputed fact that all of the Petitioners were absentee plaintiffs in the 1984 class action when it was settled. This undisputed fact has two undeniable consequences:

a. The Yonkers doctrine (Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2nd Cir. 1988) cert. den. 485 U.S. 1077 (1989)), even if a valid doctrine of removal,[1] cannot possibly justify

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[1] We remain steadfast in our view that the Yonkers doctrine is entirely invalid, going far beyond the scope of the removal statutes and laws and being

removal with respect to plaintiffs who were at best only absentee members of a prior, settled class action.[2] and

b. The dismissal was also improper because a class action settlement can never preclude subsequent collateral attacks by absentee members.

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thoroughly contrary to principles of federalism and comity. See pp. 26-43 of the Hartman Petition.

[2] Indeed, it is Petitioners' position that they were not members of the 1984 class action at all, because the class notice described a class composed only of those who were "injured" and did not mention those who were exposed to Agent Orange but had not manifested any injury at the time of the notice and the expiration of the opt-out period. Respondents' repeated statements that Petitioners conceded that they were members of the 1984 class, see pp. 15, 16, 17 18 and 24 of Brief in Opposition, are incorrect. The Hartman Petitioners never conceded that they were members of the 1984 class action, see entire Hartman Petition, but simply focused upon the judicial reality that, even if they were members of such prior class, the fact that they were "absentee" members rendered both the removal and the dismissal wholly improper.

The issues of whether the Yonkers doctrine applies and whether dismissal was proper center upon the same fundamental proposition: the absentee plaintiffs in a class action have the constitutional right to collaterally attack, in a subsequent proceeding, the prior class action settlement. See discussion at pp. 43-47 of Hartman Petition.

The Respondents make an extremely feeble attempt to counter the powerful and irrepressible proposition that this right of collateral attack precludes both the application of the Yonkers doctrine and dismissal on the basis of res judicata. See pp. 28 - 30 of Respondents Opposition Brief.

They first state:

> "The Hartman petitioners also suggest (Pet. 43-47) that the removal of this case from state to federal court amounted to a denial of the right of collateral attack. However, the

> court of appeals denied only petitioner's claim that their choice of a Texas forum for their collateral attack was unchallengeable. Pet. App. A11."

Nte. 11, p. 28, 29 of Resp. Opp. Bf.

The Respondents cite no cases supporting their outrageous implication that, despite plaintiffs constitutional right to launch a collateral attack in a subsequent proceeding in state court, the defendants somehow have the right to force the plaintiffs into federal court through the removal process. The implication is outrageous because the term "collateral" means "in another proceeding, collateral to the original proceeding", and, as noted in Taunton Gardens Co. v. Hill, 557 F.2d 877 (1st Cir. 1977), "the court that certifies a class action 'cannot predetermine the res judicata effect of the (prior) judgment; which can 'be tested only in a subsequent action'".

Thus, the real issue before the Court is not whether the subsequent collateral attack by absentee plaintiffs can be adjudicated in the same court in which the earlier class settlement was consummated, but whether the defendants can force removal to federal court of a "subsequent collateral attack" launched in state court, even though the absentee plaintiffs unquestionably had the right to choose the state court as the forum for their collateral attack.

And the answer to that question is easy. The Respondents concede that the Yonkers doctrine is dependent upon the prior federal court that approved the class action settlement being able, under the All Writs Act, 28 U.S.C. 1651(a), to issue an injunction or similar writ against the state court proceedings. See pp. 16-23, Resp. Opp. Bf.; see also

discussion in our Petition at pp. 45-47; and the discussion in Yonkers, 858 F.2d at 865.

The Respondents, in repeatedly contending that the court below could have issued an injunction against the state court proceeding and thus, under Yonkers, could remove, repeatedly overlooked the fact that the class action collateral attack doctrine precluded the issuance of an injunction in the face of the Anti-Injunction Act.[3]

At bottom is the fact that this Court has never passed upon the validity of the Yonkers doctrine and, for all the reasons expressed in our Petition, we respectfully

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[3] The relitigation exception applies only to those issues actually litigated. Chick Kam Choo v. Exxon, 486 U.S. 140, 147 (1988). The issues pertaining to the collateral attack would not, as noted above, have been properly litigated and predetermined in the 1984 class action suit.

submit that the importance of that issue, and the conflicts among the federal courts in regard to it, suggest the need for certiorari intervention by the Court. But, just as important and deserving of certiorari review, is the issue of whether, if Yonkers is a viable doctrine, removal under it can ever be appropriate with regard to absentee members of a class who want to collaterally attack, in state court, a prior class action settlement in federal court.

And finally, for the same reason that removal under Yonkers was improper - that the Petitioners had the constitutional right to launch a collateral attack in the state court - the dismissal was also clearly improper. Particularly is this true in view of Mr. Hartman's affidavit and the failure by the Respondents, by affidavit or other evidence, to

conclusively negate all potential fact issues inherent under the class action collateral attack doctrine. See Rule 56, F.R.C.P.

Therefore, for all of the above reasons and the reasons stated in the Hartman Petition, Petitioners sincerely believe that this is an important and appropriate case for the granting of certiorari.

The Hartman Petitioners pray as in their Petition.

Respectfully submitted,

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